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IN THE

Supreme Court of the United States

October Term, 1957
No. 143

EMMA SPECTOR,

Petitioner,

vs.

IONE LOIS PETE, *et al.*,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California and/or the Supreme Court of the State of California.

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Petition for Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California and or the Supreme Court of the State of California.

Emma Spector prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Fourth Appellate District of the State of California entered in the above entitled case on February 4, 1958.[1]

[1]While the final judgment was made by the District Court of Appeal, petitioner, in order to exhaust her right of review in the state court having the highest and last jurisdiction to review, made timely application for and was denied review by the State Supreme Court. Being uncertain as to which of these courts your writ should issue, she has petitioned jointly and in the alternative. *Cf. Stern and Gressman*—Supreme Court Practice, 2d Ed., p. 189.

Citation to Opinion Below.

The opinion of the District Court of Appeal [R. 31-42] printed in Appendix B, *infra*, pages 1-12, is reported in 157 A. C. A. 46 and 321 P. 2d 59. Neither the Trial Court nor the State Supreme Court rendered opinions.

Jurisdiction.

The judgment of the District Court of Appeal was entered on February 4, 1958 [R. 31]. Timely petition for a rehearing was filed in, acted upon and denied by the State Supreme Court on April 2, 1958 [R. 44]. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3) (Title, rights and immunities specially set up and claimed under certain federal statutes).

Questions Presented.

I.

Is 25 U. S. C. Section 405 a grant of authority to a restricted Indian owner of allotted, trust patented lands to negotiate and conditionally contract, before the restrictions are removed, for the sale of such lands if all parties notify the Indian authorities, strictly conform to their requirements and condition consummation of the sale upon prior Government approval?

II.

Is an agreement between a restricted Indian allottee and non-Indians for the conditional sale, when approved by the United States[2], of the Indian's trust patented lands

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[2]Both here and in the pleadings [R. 1-19] we use the United States and the Secretary of the Interior interchangeably. Actually, as will be shown in our Statement and Appendix A, *infra*, the United States acted through the Secretary who, in turn, acted through subordinates to whom his authority was lawfully delegated.

in an Indian Reservation, in which all writings are prepared by the government[1] and all negotiations and acts are done in its reservation office in strict compliance with the requirements of the Secretary of the Interior[2] and which finally results in the Secretary[2] causing a fee patent to such lands to be issued to the Indian so that he could, himself, convey, an agreement which was so *absolutely void* under *federal laws*[3] that it could neither be ratified nor enforced through specific performance?

III.

May the Secretary of the Interior use the authority vested in him by 25 U. S. C. Section 349 as a means of approval of a sale of restricted, allotted Indian lands under the authority vested in him under 25 U. S. C. Section 405?

Constitutional Provisions and Statutes Involved.

This cause does not involve the federal constitution. It involves "title and rights * * * specially set up and claimed under" the following federal statutes, the relevant portions of which are set forth in Appendix A, *infra*, pp. 2-3, to wit, 25 U. S. C. Sections 348, 349, and 405 and Section 5 of the Mission Indian Act, 26 Stat. 712.

Statement.

The cause below consists entirely of written pleadings and rulings thereon so that this Court has before it in the certified record *everything* that was before and was acted upon by the Courts below. There was no evidence

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[1] Section 5 of the General Allotment Act (25 U. S. C., Sec. 348) and Section 5 of the Mission Indian Act (Act of January 12, 1891, 26 Stat. 712).

oral or written and under settled California law, since the judgment was a final judgment of dismissal [R. 23] after the sustaining of general demurrers [R. 19A, 20] without leave to amend [R. 21] the facts as pleaded are deemed to be true. (*Katenkamp v. Union Realty*, 6 Cal. 2d 706, 709, 59 P. 2d 473; *Wohlgemuth v. Meyer*, 139 Cal. App. 2d 326, 332, 293 P. 2d 816.) Hence in this case and on this record this Court has before it and is able to determine the *admitted facts* with equal ability and from the same source of material as that which was available to the lower courts.

There are other preliminary matters which should be clarified before we proceed with this statement.

Although the record discloses two appeals, they are in reality but one. Two sets of defendants, by separate counsel, filed general demurrers to the complaint [R. 19A, 20], no copy of the judgment of dismissal [R. 23] was served upon counsel for appellant, and, believing that the case was dismissed only as to defendants Adelman and Lewis, appellant first appealed only as to them [R. 24]. Thereafter, learning from the first record prepared by the Clerk of the trial court that the judgment was a general judgment of dismissal as to all defendants, appellant appealed as to all [R. 26].

Although the complaint here is called *third* amended and supplemental complaint, it is in reality the *second* amendment. The first amendment was caused by the death of the original Indian defendant, Marcus Pete, Jr., and the necessity to substitute his administratrix in his place. The last amendment was made to include the supplemental material contained in the second cause of action. Subsequent to the filing of the original complaint and with actual and constructive knowledge of the

agreement and of the pending suit, defendant Mira Lewis accepted a conveyance of the property, to which Petitioner was entitled, from Marcus Pete, Jr., and executed and delivered to him a note.

The *undisputed facts*, as disclosed by the third amended complaint (hereinafter referred to as the complaint) were, chronologically:

(1) On April 29, 1954, Marcus Pete, Jr., an Indian member of the Palm Springs or Agua Caliente Band of Mission Indians, was the owner, as allottee and under a trust patent, of certain lands within the Palm Springs Indian Reservation in Riverside County, California [R. 3].

(2) On that date he entered into a written agreement with five tenants who occupied a part of his lands [R. 3, 13] including petitioner [R. 3] for the conditional sale to them, *jointly* [R. 3] of the lands then leased to and occupied by such lessees [R. 13].

(3) The conditions were (a) that the transaction was to be submitted to and approved by the Secretary of the Interior[4] through the District Agent at Palm Springs [R. 3] and that his approval would be evidenced by *one of two alternate means* (1) express written approval followed by the issuance of a federal fee patent direct to the purchasers *or* (2) release of the restrictions upon the Indian by issuing a fee patent to him [R. 3, 4] so that the Indian could directly consummate the transaction

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[4]The courts below took and we ask this court to take judicial notice that the authority vested in the Secretary of the Interior in 25 U. S. C., Sections 349, 404 and 405 had been delegated to the Commissioner of Indian Affairs by Executive Order 2508 and by the Commissioner to Area Directors by his Order 551, all prior to the making of the agreement here involved. The dates, Federal Register citations and quotations of the relevant portions of the texts are set forth in Appendix A, *infra*, p. 1.

[R. 7] and (b) that the conveyance of the Indian lands should be made "if and when, and only if and when" one of the foregoing, alternate forms of consent was given [R. 4].

(4) Such agreement was disclosed and submitted to the District Agent [R. 4]. He was instructed to and did inform the parties that certain modifications were required [R. 4]. Such were strictly conformed to through the execution and approval *by all parties* in the office of such District Agent of *writings which such agent prepared* [R. 4-6].

(5) In the meantime petitioner had erected and was occupying improvements upon the lands which were to be conveyed to her [R. 17].

(6) Finally, the government chose the second alternate form of approval and "elected * * * to free the property from all restrictions so that Marcus Pete, Jr., could directly consummate the transaction" and conveyed title in fee simple to him [R. 7].

(7) The Indian then expressly and partly performed the agreement by conveying the *exactly agreed upon and described portions of the whole for the exactly agreed portions of the total price to three of the joint purchasers* [R. 7-9, compare with R. 4-6] but failed and refused to convey her portion to petitioner [R. 9].

(8) Petitioner sued Pete Jr., during his lifetime [R. 11] in the Superior Court at Riverside, California, for specific performance of the agreement to convey to her [R. 11]. This suit was commenced on August 11, 1954 [R. 11] which was after Pete Jr. had received his fee simple patent [R. 7] and after he had partially performed the agreement by conveyances to other parties who were to become vendees by its terms [R. 7-9].

(9) After such suit was filed and with actual and constructive knowledge of it, defendant Mira Lewis accepted a conveyance from Pete Jr., of the property which he had contracted to convey to petitioner, and by amendment, petitioner sought to quiet her title against such conveyance [R. 10-11, 18]. Pete Jr. died *pendente lite* and his widow, as his administratrix was substituted for him by amendment [R. 2].

(10) Other vendees, who were parties to the joint sale agreement and to whom Pete Jr., conveyed in strict accordance therewith [R. 7-9], were sued as defendants because of acts and conveyances *pendente lite* [R. 12-17] which would tend to defeat complete equitable relief.

Defendants demurred, generally, to the amended complaint upon the ground that it did not state facts to constitute a cause of action [R. 19A, 20]. This was all that was required under California Practice and Procedure and the *details of the basis of the objections* appeared only in the oral arguments to the trial court (which was not reported) and in typewritten briefs which are not a part of the certified record. However, as we shall show through references to the opinion of the Court below (District Court of Appeal) the following issues, in which each side specially set up and claimed title, rights or immunity under federal Indian statutes, were considered and determined by the trial and appellate courts below:

1. Defendants claimed that because the agreement was made before the restriction upon conveyance was removed by issuance of the fee patent to Pete, Jr., the facts that it was made with the knowledge, cooperation and pursuant to the directions and requirements of the Gov-

ernment's authorized agents, and was conditioned upon their approval, was immaterial and irrelevant and that it was null and void *ab initio* and could not be ratified because of the provisions of Section 5 of the Mission Indian Act; 26 Stat. 712, and Section 5 of the General Allotment Act; 25 U. S. C. Section 348, 24 Stat. 389, both of which provide, in part:

> "And if any conveyance shall be made of the lands set apart and alloted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void" [*Cf.* Appellate Court Opinion, Appendix B, pp. 5, 6; R. 35, 36].

Petitioner contended that:

(1) These restrictive provisions of Section 5 of the Mission Indian and General Allotment Acts were amended by U. S. C. Section 349 (Appendix A, p. 2) and 25 U. S. C. Section 405, 34 Stat. 1018 (Appendix A, p. 3) *so that the restricted Indian could negotiate with prospective purchasers for a conditional sale* to be reported to, to comply with and to become effective only, if and when approved by the United States [*Cf.*[3] Appellate Court Opinion, Appendix B, pp. 7-8; R. 37-38].

(2) Said Sections 5 (Appendix A, p. 2), were also amended by 25 U. S. C. Section 349 (Appendix A, p. 2) and it was a lawful and appropriate method of approval for the United States to free the restrictions by issuing a fee patent to the Indian so that he, himself,

[3]Such, we believe, was the construction thereof by the United States Attorney General, 36 O. A. G. (U. S.) 98, and by the Solicitor of the Department of the Interior—Fort Hall Lands, 48 L. D. 455; quoted from *infra*; pages 13-14.

could directly consummate said transaction [*Cf.* Appellate Court Opinion, Appendix B, pp. 8, 9; R. 38, 39].

(3) That the agreement for sale had been *approved* through issuance of the fee patent to Pete, Jr., and was, therefore, specifically enforceable. [Appellate Court Opinion, Appendix B, p. 9; R. 39].

(4) That, even if such issuance of a fee patent was not the equivalent of an approval of the sale, all actions by the parties up to the time when the Secretary elected to exercise the second alternative were lawful and the agreement was, therefore, voidable by the Secretary and not void *ab initio* [Appellate Court Opinion, Appendix B, pp. 8-9; R. 38-39].

(5) Therefore, being *voidable* and not *void*, Pete, Jr., could affirm and ratify it after he was freed from the restrictions [Appellate Court Opinion, Appendix B, pp. 5-6; R. 35-36].

The trial court, without opinion, held the agreement void *ab initio*, rejected petitioner's claims, sustained the demurrers to her complaint without leave to amend [R. 22] and entered a judgment dismissing her action [R. 23]. Petitioner appealed [R. 24, 26], the District Court of Appeal affirmed after considering and ruling as above shown upon said federal questions and statutes [R. 31-42] and the State Supreme Court denied a timely petition for rehearing [R. 44].

REASONS FOR GRANTING THE WRIT.

Preliminary Statement.

Basically, the writ should be granted and the judgment below should be reversed, vacated and remanded because it is *legally and morally wrong*, because it will pauperize and ruin a widow (the petitioner) whose only error has been to accept and follow the dictates of her Government through its authorized officials and, more particularly important to this Court, because if allowed to stand, it will be a vital blow to the marketable title and future development of the lands within the Palm Springs Indian Reservation.[6]

While, on its face, the decision sought to be reviewed may seem to be a victory for and favorable to the Indians, it is just the contrary. It is merely a fortuitous windfall to a non-Indian interloper who persuaded an Indian to violate his commitment and it will establish a precedent which will (a) destroy at one stroke the many

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[6] "The total estimated value of the *allotted* lands in the Palm Springs Reservation is $7,300,000 * * *. The total value of unallotted tribal lands is estimated to be $12,120,000 * * *. Because so much of the land in and around the city is not available for purchase by developers, there is a growing tendency to bypass Palm Springs and to extend the development down the valley toward Cathedral City and Indio. If that trend persists the present values of all lands in Palm Springs, including the present Indian allotments, will be prejudiced. * * * much of the value of the Indian lands, both allotted and unallotted, therefore, depends upon making some of them available for sale for development purposes * * *. Palm Springs is a winter-resort area, and the tribal lands are regarded only as an investment asset, not as an area for Indian use and occupancy * * *".

Excerpts from letter to Speaker Rayburn, dated June 14, 1957, from Hatfield Chilson, Under Secretary of the Interior—page 5, Serial No. 17—Land Allotments on Agua Caliente Reservation, Calif.—Report of Hearing Before a Special Subcommittee of the Committee on Interior and Insular Affairs, House of Representatives, Eighty-Fifth Congress, First Session.

years of labor of petitioner's counsel and others, including many earnest local representatives of the Indian office, to persuade *both* the Indians and the non-Indians to *deal with* the local Indian Officials; (b) it has already caused title companies to refuse to issue policies of title insurance on Palm Springs Indian lands unless it can be *conclusively proved* that the vendee had no negotiations whatever with the Indian before the sale was consummated (whether or not such negotiations were known to or collaborated in by the Indian Office) and, (c) in California, a policy of title insurance is an established prerequisite to a marketable title. Lastly, and most disastrous to these long suffering Indians, the decision below will greatly impair if it does not completely defeat the beneficent purposes of 25 U. S. C. Sections 369 and 405, which as interpreted by Solicitor were "to extend relief (so that) aged and indigent living allottees, having no inherited interests which could be sold (could obtain) needed funds in many cases to provide the common necessities of life." These Indians have lands of great *potential* value within the City of Palm Springs and adjacent to expensive and highly developed resort improvements owned by non-Indians. Intelligent planning and negotiations for improvement through loans upon or sale of such lands requires preliminary commitment for payment of large sums of money which no responsible person or group will do (a) if after all the red tape and delays in negotiating through the Indian Office, and even if approved, the whole transaction is tainted and is *void ab initio* if the Indian has done or signed anything before final consummation or (b) if the Indian cannot be bound if the Government at the last minute decides to issue a fee patent to enable the Indian to consummate the deal and the Indian may freely

disavow it, and, by reason of these contingencies, title companies will refuse to issue policies of title insurance and the developer, lender or purchaser will be unable to obtain a marketable title.

Nevertheless, we realize that this Court is not just another court of review, nor is it primarily concerned with the correction of errors in lower court decisions. Hence, we proceed with specific designation of reasons within the purview of Rule 19 of this Court.

1. The state courts have decided federal questions of substance and of grave importance to the administration of Indian lands in California *which have never been decided by this Court* or any federal court and have decided them in a way which is probably not in accord with interpretations of such federal laws by the federal Attorney General and the Solicitor of the Department of the Interior, the executive department charged with administering these laws.

(a) This Court *has never passed upon* the effect or operation of 25 U. S. C. Section 405 (Appendix A, p. 3) as an amendment to and amelioration of the prohibitory provisions of Sections 5 of the Mission Indian and General Allotment Acts (*Cf.* p. 8, *supra*), but the federal Attorney General has interpreted said Section 405 to "have to some extent permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior." His views, which we believe to be contrary to the judgment below, are illustrated in the following excerpts from two of his opinions:

> On May 21, 1890, approximately three years and three months after 25 U. S. C. Section 348 (24 Stat. 388; Sec. 5, General Allotment Act) was enacted,

the United States Attorney General informed the Secretary of the Interior that

> "* * * the legislation above mentioned (Sec. 5 of the General Allotment Act) deprives the Indian * * * of the right of conveying or incumbering the land in any way for the period stated * * *" 19 O. A. G. (U. S.) 559.

But, later, on October 5, 1929, after 25 U. S. C. Section 405 (34 Stat. 1018) had been enacted on March 1, 1907, the federal Attorney General advised the Secretary

> "* * * under the early statutes, various restrictions were placed upon Indian properties, and certain time-limitations fixed, within which such restrictions might not be removed. For example, see 24 Stat. 388 (25 U. S. C. Sec. 348). Under these statutes, *the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed.* Later, however, Congress passed statutes which to some extent permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. Among such statutes may be noted * * * 34 Stat. 1018 (25 U. S. C. Sec. 405) * * *" (Emphasis and code references added.) 36 O. A. G. (U. S.) 98.

This Solicitor is in accord, *e.g.*

> "The General Allotment Act of February 8, 1887, 24 Stat. 388, (25 U. S. C. 348) on which most of our Indian 'trust allotments' are founded, directs that the lands allotted shall be held in trust for a period of twenty-five years, at the expiration of which a patent in fee would issue to the allottee or his heirs. *Evidently this act contemplated that the allotments made thereunder should remain inalien-*

able and nontaxable for the full period of twenty-five years, as no provision is to be found in that act, or in any contemporaneous legislation, under which that period could be abridged or which would permit of any alienation of the allotments so made. Naturally many of the original allottees died, and their heirs having allotments in their own names were in no great need of additional lands. They did need funds, however, with which to improve their individual holdings. The Act of May 27, 1902, (25 U. S. C. 379) relieved this situation by permitting the heirs to sell, with the approval of the Secretary of the Interior. *This was soon found to be insufficient. Aged and indigent living allottees, having no inherited interests which could be sold, needed funds in many cases to provide the common necessities of life. Congress again came to the rescue and the act of March 1, 1907, (25 U. S. C. 405) lodged in the Secretary of the Interior, authority to extend relief in such cases."* (Emphasis and Code references added.) Fort Hall Lands, 48 L. D. 455.

Previously he had said:

"It may be stated in this connection that *existing laws authorize an Indian under certain conditions, prior to the expiration of the trust period declared in his patent, to sell or convey all or part of his land.* The usual provision in said laws is that the Secretary of the Interior shall cause to be issued to the purchaser a patent in fee for the land. *In some of these laws, however, notably what is known as the 'non-competent Act' of March 1, 1907* (34 Stat. 1018) (25 U. S. C. Sec. 405) *the Secretary is authorized to approve a deed of conveyance executed by the allottee."* (Emphasis and code reference supplied.) Im-Ow-Tan-Ie (1914), 43 L. D. 102.

Again, the Solicitor has construed both 25 U. S. C. Sections 349 and 405 to be of general operation and amendatory of 25 U. S. C. Section 348, *e.g.*

> "The acts of May 27, 1902 (25 U. S. C. Sec. 379) and March 1, 1907 (25 U. S. C. Sec. 405) are of general operation, there being no exception of any State or Territory." (Code references supplied.) 40 L. D. 179, 181.

> "As the amendatory act of May 8, 1906 (25 U. S. C. Sec. 349) which is a general act * * * prescribes a different mode of disposal of land * * * prior to the expiration of the trust period, it amounts to a repeal in that respect of the act of February 8, 1887 (25 U. S. C. Sec. 348.)" (Code reference supplied.) 36 L. D. 210, 212-213 (1907).[7]

Counsel for defendants and the Court below relied upon this Court's decision in *Sage v. Hampe*, 235 U. S. 99,

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[7]While the lower court has garbled our language and erred in its citation of our authorities [Appendix B, p. 8; R. 38] petitioner's argument is summarized, as follows: We pointed out that 25 U. S. C. Section 405 *contemplated* that the Indian would seek approval of a *sale before the restrictions had expired*, that, as necessary conditions precedent to such application he must find and agree upon (1) a buyer, (2) the property to be sold, (3) the price and (4) the terms and conditions of the sale, because the federal Attorney General had advised the Secretary of the Interior that, in exercising his discretion as to whether to approve the sale, the Secretary should consider such factors, 27 O. A. G. (U. S.) 530, 541.[8] Also, that the Secretary could *effect* such approval by releasing the restrictions through issuing a fee patent to the Indian applicant.

[8]"Third, you ask the nature of the facts which you should require to be shown to you in order to justify the approval of deeds (by Indians). This is a matter for the exercise of your own judgment and discretion. Generally speaking, you should be satisfied that the price paid is not unfair, and that in view of the situation and intelligence of the heirs and the facts and circumstances of the transaction, the sale is one which a prudent guardian, having in mind the welfare of his ward, should approve." (27 O. A. G. (U. S.) 530, 541.)

35 S. Ct. 94, 59 L. Ed. 147 [Appendix B, p. 5; R. 35] but in that case this Court was reviewing a factual situation where the parties had intentionally avoided contact with the federal officials and intended to circumvent the Federal Indian Policy.

(b) This Court has never passed upon the effect or operation of 25 U. S. C. Section 349 (Appendix A, p. 2) *as a means of approval of an Indian's proposed sale.* But it has held that the issuance of a fee patent thereunder effects removal of the Indian's disability, *Larkin v. Paugh*, 276 U. S. 431, 439, 48 S. Ct. 366, 72 L. Ed. 640, and it denied certiorari in a case where the 10th Circuit expressly held that the issuance of such fee patent *could be made for such purpose*, *Miller v. United States*, 57 F. 2d 987, 991, cert. den. 287 U. S. 625, 53 S. Ct. 79, 77 L. Ed. 542.[9]

2. The State courts have decided such federal questions of substance probably not in accord with substantially applicable decisions of this Court.

While not directly applicable, the decisions of the courts below seem contrary to the effect of the following decisions by this Court.

Pickering v. Lomax, 145 U. S. 310, 316, 12 S. Ct. 860, 36 L. Ed. 716, reversing 120 Ill. 293. That case involved 7 Stat. 320 which provided, in part, that the Indian lands were

> "never to be leased or conveyed (by the grantee or his heirs) to any person whatever, without the permission of the President * * *".

[9] "The patents were issued (under 25 U. S. C. Sec. 349) for the purpose of enabling the Indian to sell the land described in his application."

An Indian conveyed such restricted land prior to obtaining express approval from the President. Many years thereafter the President approved the Indian's deed. The Illinois Supreme Court construed the conveyance to be void *ab initio* and held it could not be ratified. This court reversed, holding (p. 316):

> "The object of the proviso was not to prevent the alienation of lands *in toto* but to protect the Indian from improvident disposition of his property"

and held that the conveyance could be ratified at any time before the rights of *innocent* purchasers for value had intervened.

We asked in the Court below and repeat here—what better protection from improvident disposition could an Indian have than to negotiate his proposed sale in the Indian Office and according to the Secretary's requirements?

This Court followed the same reasoning and cited *Pickering v. Lomax, supra*, in *Lykins v. McGrath*, 184 U. S. 169, 170-171, 22 S. Ct. 451, 46 L. Ed. 485; *Anchor Oil Co. v. Gray*, 256 U. S. 519, 520, 41 S. Ct. 545, 65 L. Ed. 1073.

3. The judgment below upon such federal questions is contrary to decisions of lesser federal courts and this Court should review and supervise to finally determine such conflict.

(a) By implication, if not directly, the District Court of Appeal has held that the issuance of the fee patent to Pete, Jr., could not be an approval of the agreement to sell [Appendix B, p. 11; R. 41]. The Tenth Circuit has held that it could.

Miller v. United States, 57 F. 2d 987, 991 (p. 16, *supra*) is to the contrary.

(b) The lower court has held that the agreement could not be ratified except by a *new* agreement made after the restraint was removed [Appendix B, pp. 6-7; R. 36-37]. The Eighth Circuit has held that it is subject to ratification after the restraint is removed without a *new* agreement and that if a party then "enters into relations with one of the parties, which are only consistent with the adoption of such contract" it is a ratification which binds him. Also, that the rule is no different in respect to *an Indian*.

> *Self v. Prairie Oil & Gas Co.*, 28 F. 2d 590, 595-596, cert. den. 278 U. S. 659, 49 S. Ct. 250, 73 L. Ed. 567.

Such was what Pete, Jr., did here [R. 7-9].

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRL DAVIS BRETT,

Counsel for Petitioner.

APPENDIX A.

Portion of text of Executive Order 2508 issued by the Secretary of the Interior January 11, 1949 and published January 18, 1949 in 14 Federal Register, pages 258-260:

Section 13—Lands and Minerals—the Commissioner (of Indian Affairs) may exercise the authority of the Secretary in relation to the following classes of matters:

(b) The approval of applications for patents in fee or certificates of competency, pursuant to the provisions of 25 C. F. R., Part 241.

(d) The approval of sales and conveyances of original allotments and inherited lands pursuant to the provisions of 25 C. F. R., Part 241.

Portion of text of Order 551 issued by the Commissioner of Indian Affairs on March 29, 1951 and published on April 4, 1951 in 16 Federal Register 2039:

Section 3. Authority of Area Directors.

The Area Directors may exercise the authority of the Commissioner of Indian Affairs in the following classes of matters:

Section 4. Fee Patents and Competency Certificates.

The approval of applications and patents in fee or certificates of competency, pursuant to the provisions of 25 C. F. R., Part 241.

Section 5. Sales and Conveyances.

The approval of sales and conveyances of original allotments and inherited lands pursuant to the provisions of 25 C. F. R., Part 241.

Portion of Section 5, General Allotment Act, 24 Stat. 388, 389, approved February 8, 1887, codified as 25 U. S. C. Section 348.

"* * * and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void * * *"

Portion of Section 5, Mission Indian Act, 26 Stat. 712, 713, Act approved January 12, 1891, not codified.

"* * * and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void * * *"

349. Patents in fee to allottees.—At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its juridiction the equal protection of the law: Provided, that the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing

of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of sections 331 to 334, 339, 341, 342, 349, and 381 shall not extend to any Indians in the former Indian Territory. (Feb. 8, 1887, c. 119, Sec. 6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

405. Sale of allotment of non-competent Indians.—Any non-competent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee-simple patent had been issued to the allottee. (Mar. 1, 1907, c. 2285, 34 Stat. 1018.)

APPENDIX B.

Opinion of the District Court of Appeal.

[Civ. No. 5568. Fourth Dist. Feb. 4, 1958.]

Emma Spector, Appellant, v. Ione Lois Pete, as Administratrix, etc. *et al.*, Respondents.

Appeal from a judgment of the Superior Court of Riverside County. Russell S. Waite and O. K. Morton, Judges. Affirmed.

Action for specific performance of a contract to sell land, to quiet title, and for equitable relief. Judgment of dismissal affirmed.

Irl Davis Brett for Appellant.

Thompson & Colegate, F. Gillar Boyd, Jr., and Arnold Rumwell for Respondents.

GRIFFIN, *J.*—Plaintiff and appellant brought this action which is set forth in a third amended complaint and supplement thereto (hereinafter referred to as the complaint) for specific performance, to quiet title, and for equitable relief. It is alleged generally that on April 29, 1954, Marcus Pete, Jr., an Indian, and a member of the Palm Springs or Agua Caliente Band of Indians, was the owner of certain lands, to wit: Block 2, Section 14, Township 4 S., R. 4 E., S. B. B. & M., within the Palm Springs Indian reservation; that on said date he entered into a written agreement with the contracting purchasers, jointly, namely, defendants C. W. Miller and wife, Oscar Mandinach and wife, Ronald R. Dunlap and wife, and Dr. W. H. Clarkson and wife, to buy said property as a unit for $78,660; that Marcus Pete, Jr., conditionally agreed therein to submit said transaction to the Secretary of the Interior of the United States, through the district agent at Palm

Springs, for approval by the United States, evidenced either by the express written approval or the issuance of a patent direct to the contracting purchasers or by releasing all restrictions imposed by law upon his right to convey through the issuance and delivery to him of a full, unrestricted fee patent, and that such conveyance should be made if and when, and only if and when, the United States issued and delivered a patent to the contracting purchasers, or said Marcus Pete, Jr., received an unrestricted fee patent thereto; that in part performance thereof Pete and the contracting purchasers submitted said transaction to the United States for approval through the district agent; that subsequent thereto the district agent was instructed by the United States to inform Pete and the others that the United States would require that its patent to the contracting purchasers be made to one individual *only* and that the parties choose and select the person who would become grantee, in trust, for them; that by supplemental agreement in writing, Pete and the contracting purchasers agreed that the total amount should be conveyed by patent from the United States to defendant Miller, and subsequent arrangements would be made between them for the partition of the whole, at the price formerly agreed upon; that immediately thereafter, and in part performance thereof Pete and the contracting parties met with the district agent and agreed in writing, by approving a sketch made by agent, that such land should be partitioned and separately conveyed to said purchasers, *i. e.*, to plaintiff, a certain described part of Lot 2, and a certain described individual portion thereof to each of the other contracting purchasers and their wives; that subsequent thereto and prior to the partial partition hereinafter alleged, the United States elected not to issue a patent direct to defendant Miller

but instead to offer the property free of restrictions to Pete so he could directly consummate said transaction, by issuing and delivering to Pete an unrestricted fee patent to all of said property, and in furtherance thereof it executed and delivered to Pete a fee simple patent to the whole on June 30, 1954; that after receiving said patent Pete, in part performance of the agreement to convey, partitioned said lands by conveying portions thereof to certain of the contracting defendants by grant deeds dated July 29, 1954, and August 5, 1954; that plaintiff performed her part of the agreement, and Pete failed and refused to deed the portion claimed by plaintiff, without plaintiff's knowledge or consent, but on August 25, he deeded that portion to one Myra Lewis; that thereafter Pete accepted a deed of trust on this property, dated August 28, 1954, naming Pete as beneficiary; that defendant Myra Lewis was acting for an undisclosed principal, defendant Abe Adelman, her uncle, who had both actual and constructive knowledge of the agreement sued upon and at the time, August 11, this action was pending and *lis pendens* was of record; that the reasonable value of said property was $78,000, and plaintiff's claimed portion was of the value of $7,500; and that the agreement sought to be specifically alleged was just and reasonable.

Marcus Pete, Jr., died on May 2, 1955, and the action proceeded against defendant Ione Lois Pete, as administratrix. At the time this action originated, each of the contracting purchasers was the separate holder of a lease upon the property agreed to be conveyed by Pete to them, with the possible exception of a 3-foot strip described, which plantiff alleges other defendants hold without right. As a second cause of action certain other conveyances were alleged to have been made after this action was filed and

after *lis pendens* recorded, involving the same property in which Pete reconveyed the property, including the 3-foot strip, back to the other contracting parties, notwithstanding plaintiff had erected and was occupying improvements she had placed on the property which she was leasing and agreed to purchase from Pete.

The prayer is that the administratrix be required to specifically perform the contract Pete made with plaintiff and to convey that portion to her which is specifically described; that other defendants be compelled to reconvey to her any portion of that land to which they may claim any interest, to quiet plaintiff's title thereto, and for general relief. A general demurrer to the complaint was, by order of Judge Waite, who heard the argument, sustained without leave to amend. A judgment of dismissal was subsequently signed by Judge Morton. The appeal is from the judgment and order.

It affirmatively appears from the facts alleged in the complaint that Marcus Pete, Jr., was an Indian of the Agua Caliente Band of *Mission* Indians, and was, at the time of the execution of the written instrument to sell the property, in a restricted or incompetent status. (The word incompetent, as thus used, has been judicially defined to mean an Indian whose right to alienate his land is restricted (United States v. Nez Perce County [Idaho] 267 F. 495), and who is a ward of the United States Government.) The property he then owned was an Indian Trust patent issued to him pursuant to section 5 of the General Allotment Act [24 Stats. 389, *et seq.*, which is codified as 25 U. S. C. § 348]. By the express terms thereof:

"Upon the approval of the allotments provided for in sections 331 to 334 inclusive, and 336 by the Secretary

of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever: . . . *And if any conveyance shall be made of the lands set apart and alloted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.* . . ." (Italics ours.)

The main question is whether the conditional agreement, as amended, for the sale of the land was lawful or whether it was null and void *ab initio*. Plaintiff claims it was lawfull or at least voidable and therefore subject to ratification, citing such authority as Smith v. Glo-Fire Co., 94 Cal. App. 2d 154 [210 P. 2d 286.] Defendants argue that by the terms of the statute itself, above quoted, the agreement was null and void and accordingly, as such, would be unenforceable in a specific performance action. In face of the positive language there used and italicized, it does not appear that it could be held otherwise, particularly if the Secretary of the Interior did not give his approval to it. This conclusion is fortified by the decisions in Sage v. Hampe, 235 U. S. 99 [35 S. Ct. 94, 59 L. Ed. 147]; United States v. Walters, 17 F. 2d 116; MacRae v. Heath, 60 Cal. App. 64 [212 P. 228]; Berka v. Woodward, 125 Cal. 119 [57 P. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420]; Arenas v. Preston, 181 F. 2d 62;

United States v. Hellard, 322 U. S. 363 [64 S. Ct. 985, 88 L. Ed. 1326]; United States v. Brown, 8 F. 2d 564; Probert v. Kibby, 87 Okla. 198 [209 P. 916]; and Kelley v. New State Land Co., 115 Okla. 170 [245 P. 988].)

It is plaintiff's position that even if the contract of purchase was void under that statute, voidable, or was lawful, it was ratified by Pete's actions after the issuance of a patent in fee and after the disability was removed by partially executing the agreement in deeding the other portions of said property to the named defendants.

It is the general rule that a contract that is null and void is incapable of being ratified and cannot create an estoppel. (Butterfield Construction Co. v. Federal Land Value Ins. Co., 5 Cal. App. 2d 16 [41 P. 2d 958]; Industrial Indem. Co. v. Golden State Co., 117 Cal. App. 2d 519 [256 P. 2d 677]; Rideout v. Eich, 100 Cal. App. 135 [280 P. 140]; Wood v. Imperial Irr. Dist., 216 Cal. 748 [17 P. 2d 128].)

As to the claimed ratification pleaded, there is no indication showing any additional contract or dealings whatever between plaintiff and Pete, after he received his patent on June 30, 1954. If there was a ratification it would necessarily have to be by the Indian himself after attaining competency. The only attempt to plead ratification is that after attaining competency and receiving his patent he sold and deeded several parcels of his land as above indicated, to other persons. The original written agreement or the amendment to it was not pleaded *in haec verba* nor was a copy attached to the complaint. Apparently there were many changes made, different from the original written agreement, particularly as to the description of the property, name of the party or parties who were to hold title to the property if and

when the patent was issued, and the method of dividing it between the contracting purchasers.

It is a general rule of pleading in a specific performance action that the complaint show the existence of a valid and binding contract with the defendant and one which is specifically enforceable. (49 Am. Jur. p. 182, § 159.)

In opposition to this conclusion, plaintiff argues that a later Act of Congress *permitted* conveyance and sale of such an allotment. (The word "allotment" is used interchangeably with a restricted or trust patent.) 34 Stats. 1018, 25 United States Code, section 405, reads in part:

"Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty . . . may sell or convey all or any part of such allotment . . . *on such terms and conditions* and under such rules and regulations *as the Secretary of the Interior may prescribe.*" (Italics ours.)

Plaintiff concedes that there is adequate authority holding that an agreement made to sell restricted Indian lands, where the agreement and consumation thereof was made without authority and without knowledge of the Secretary of the Interior, is void, citing United States v. Walters, 17 F. 2d 116 and cases cited, but claims neither she nor defendants have found a case directly in point on the facts here alleged which shows the contract was conditioned on such approval before the conveyance was made and where both the Indian and purchasers imediately complied with its requirements and petitioned for such authority and agreed to abide by all requirements exacted and agreed to defer conveyance until after the restrictions were removed.

It is argued that these are the distinguishing factors: that to obtain such consent the Indian must petition the Secretary of the Interior in writing and that it is necessary as a condition precedent to so doing that he have an identified purchaser, identified property which it to be sold, a fixed price, and the terms and conditions of the sale, because it is his duty to exercise discretion as to whether the sale shall be permitted, citing 27 Opinions United States Attorney General, 530 and 541; that there is an alternate method of obtaining the right to sell, to wit: By convincing the Secretary of the Interior so he will, in his discretion, cause a fee simple patent to be issued to the Indian as authorized by 25 United States Codes, section 348, *supra*; and that once the fee simple patent has been issued the prior trust and the incidental restriction against alienation is terminated, citing Larkin v. Paugh, 276 U. S. 431, 439 [48 S. Ct. 366, 368, 72 L. Ed. 640]. In this connection certain dictum from Oates v. Freeman, 57 Okla. 449 [157 P. 74, 80], is cited. It reads:

". . . counsel says: 'We want to make plain the distinction between a legal and an illegal act. Deeds, leases, and other instruments affecting restricted lands, which are executed with the intention of obtaining the approval of the Secretary of the Interior, are not illegal, and do not violate any provision of the act of Congress. *These instruments never become valid unless approved*, but after approval they have the same validity as though the instrument had originally covered unrestricted land. On the other hand, instruments made for the purpose of evading the statute, without any intent of procuring the approval of the Secretary of the Interior, fall within the inhibitions of Congress.'

"This may be conceded to be a correct statement of law." (Italics ours.)

It is therefore argued that the Secretary of the Interior approved the sale in the instant case by his actions and that the original agreement then had the same validity as though the parties had conveyed unrestricted land and the contract was subject to specific performance.

In answer to this contention the facts here pleaded clearly show that the Indian, while noncompetent, signed the agreement of April, 1954, which provided in general terms that for the consideration of $78,660, he conditionally, upon the approval of the Secretary of the Interior (which approval was necessary to validate it) would convey to the contracting parties jointly the lands described as a unit; that the approval would be evidenced by express written approval and issuance of a United States patent direct to the contracting purchasers or by releasing all restrictions imposed by law upon his right to convey, and that such conveyance should be made only if and when the United States issued and delivered a patent to the contracting purchasers of said Marcus Pete received an unrestricted fee patent thereto.

It might well appear from later enactments of Congress (34 Stats. 1018, "Non-competent Act" March 1, 1907, 25 U. S. C. § 405) and decisions based thereon that, under certain conditions, a noncompetent Indian, prior to the expiration of the trust period, is authorized to sell or convey all or part of his land, *subject to the approval of the* Secretary of the Interior, and *upon such terms and conditions as he may prescribe*, and the secretary is also authorized to approve a deed of conveyance executed by the allottee and it carries full title, as if fee simple patent had been issued to the allottee. (43 L.D. [1914] I.M.-O.W.-Tan-I.C. pp. 102-103; 48 L.D. [1921] Fort Hall Lands, 455, at pp. 457-458; 40 L.D. [1911] pp. 179-

written agreement was then entered into between Pete (who was still noncompetent) and the contracting parties, that the property mentioned should be conveyed to Miller for this purpose and that subsequent agreements would be made between them for the partitioning of the whole and allocating the purchase price of $78,660 among them. (Apparently this modified and changed the terms of the original agreement providing that the patent should be issued to the parties named or to Pete in person.) It then alleged that immediately and in part performance thereof (apparently the amended agreement) Pete, and the contracting defendants met and agreed in writing, by approving a sketch, as to the method of partitioning the described portions each named party was to have and the price to be paid for such portions. It then alleged that subsequently the Secretary of the Interior did not follow or approve this plan or agreement and elected not to issue a patent direct to Miller, but instead, decided to directly issue and deliver to Pete an unrestricted fee patent to all the property. This was done on June 30, 1954.

It therefore appears that the Secretary of the Interior did not approve the amended agreement as to the method of issuance of the patent and the allocation of the property which agreement modified the original agreement as to the general disposition of the property. Accordingly the agreement, as thus amended and modified, was not specifically enforceable for the reason it was not *approved by the Secretary of the Interior* and was therefore void

under the authorities heretofore cited. Likewise, the alleged written agreement, as thus amended, was indefinite. It is claimed by plaintiff that in it there was some mistake or misdescription of the property now claimed by her.

The allegation of part performance of the agreement was based upon the amendment proposed but which was rejected by the Secretary of the Interior. The agreement as amended, not being approved by the Secretary of the Interior, was void and not subject to ratification. (See cases above cited.)

Although the equities of this case strongly favor a recovery by the plaintiff, we conclude that under the pleadings and authorities cited the trial court properly sustained the demurrer without leave to amend.

Judgment of dismissal affirmed.

BARNARD, *P. J.* and MUSSELL, *J.*, concurred.